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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 KENNETH C.,

9 Plaintiff,

CASE NO. C17-5974-MAT

10 v.

ORDER RE: SOCIAL SECURITY
DISABILITY APPEAL

11 NANCY A. BERRYHILL, Deputy
Commissioner of Social Security for
Operations,

12 Defendant.
13

14 Plaintiff proceeds through counsel in his appeal of a final decision of the Commissioner of
15 the Social Security Administration (Commissioner). The Commissioner denied plaintiff's
16 applications for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) after
17 a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the
18 administrative record (AR), and all memoranda, this matter is AFFIRMED.

19 **FACTS AND PROCEDURAL HISTORY**

20 Plaintiff was born on XXXX, 1985.¹ He completed high school and attended some college.
21 (AR 64-65.) Plaintiff previously worked as a child monitor, general hardware salesperson,
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23 ¹ Dates of birth must be redacted to the year. Fed. R. Civ. P. 5.2(a)(2) and LCR 5.2(a)(1).

1 material handler, cashier II, and stock clerk. (AR 40, 99.)

2 Plaintiff protectively filed DIB and SSI applications on December 2, 2013. (AR 247-56.)
3 The record shows the alleged onset date of disability as October 1, 2009. (*See, e.g.*, AR 63.) *See*
4 *also supra* at 7. His applications were denied initially and on reconsideration.

5 On November 24, 2015, ALJ Kelly Wilson held a hearing, taking testimony from plaintiff
6 and a vocational expert (VE). (AR 60-103.) (*See also* AR 49-59 (initial hearing on July 6, 2015
7 continued to allow for plaintiff to obtain representation).) On May 9, 2016, the ALJ issued a
8 decision finding plaintiff not disabled. (AR 24-43.)

9 Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review on
10 September 19, 2017 (AR 1-5), making the ALJ's decision the final decision of the Commissioner.
11 Plaintiff appealed this final decision of the Commissioner to this Court.

12 **JURISDICTION**

13 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

14 **DISCUSSION**

15 The Commissioner follows a five-step sequential evaluation process for determining
16 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
17 be determined whether the claimant is gainfully employed. Plaintiff had worked after the alleged
18 onset date, but the work activity did not rise to the level of substantial gainful activity. At step
19 two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found
20 plaintiff's morbid obesity, depression, anxiety, and avoidant personality disorder severe. Step
21 three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ found
22 plaintiff's impairments did not meet or equal a listing.

23 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess

1 residual functional capacity (RFC) and determine at step four whether the claimant has
2 demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to perform
3 less than the full range of light work, with the following limitations: lift and/or carry twenty
4 pounds occasionally and ten pounds frequently; sit for six hours and stand and/or walk for two
5 hours in an eight-hour workday; occasionally balance, stoop, kneel, crouch, crawl, and climb;
6 avoid concentrated exposure to vibration and hazards, such as dangerous moving machinery or
7 working at unprotected heights; can perform both simple and detailed tasks, but might have
8 difficulty performing more complex tasks consistently due to anxiety; would consequently work
9 best in an environment where he did not have to work with the general public, although occasional
10 superficial interactions could be tolerated; and can work in proximity to coworkers and interact
11 with them, but would perform better in more solitary work tasks. With that assessment, the ALJ
12 found plaintiff unable to perform past relevant work.

13 If a claimant demonstrates an inability to perform past relevant work, or has no past
14 relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant
15 retains the capacity to make an adjustment to work that exists in significant levels in the national
16 economy. With the assistance of the VE, the ALJ found plaintiff capable of performing other jobs,
17 such as work as a production line solderer, electrical accessories assembler, and inspector hand
18 packager.

19 This Court's review of the ALJ's decision is limited to whether the decision is in
20 accordance with the law and the findings supported by substantial evidence in the record as a
21 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). *Accord Marsh v. Colvin*, 792 F.3d
22 1170, 1172 (9th Cir. 2015) ("We will set aside a denial of benefits only if the denial is unsupported
23 by substantial evidence in the administrative record or is based on legal error.") Substantial

1 evidence means more than a scintilla, but less than a preponderance; it means such relevant
2 evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v.*
3 *Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of
4 which supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278
5 F.3d 947, 954 (9th Cir. 2002).

6 Plaintiff avers error in evaluating the medical evidence, his symptom testimony, and lay
7 evidence, at step three, in the RFC, and at step five. He requests remand for an award of benefits
8 or, alternatively, for further administrative proceedings. The Commissioner argues the ALJ's
9 decision has the support of substantial evidence and should be affirmed.

10 Symptom Evaluation

11 Absent evidence of malingering, an ALJ must provide specific, clear, and convincing
12 reasons to reject a claimant's testimony.² *Burrell v. Colvin*, 775 F.3d 1133, 1136-37 (9th Cir.
13 2014). "General findings are insufficient; rather, the ALJ must identify what testimony is not
14 credible and what evidence undermines the claimant's complaints." *Lester v. Chater*, 81 F.3d 821,
15 834 (9th Cir. 1996). The ALJ may consider a claimant's "reputation for truthfulness,
16 inconsistencies either in his testimony or between his testimony and his conduct, his daily
17 activities, his work record, and testimony from physicians and third parties concerning the nature,
18 severity, and effect of the symptoms of which he complains." *Light v. Social Sec. Admin.*, 119
19 F.3d 789, 792 (9th Cir. 1997).

20 The ALJ here found plaintiff's statements concerning the intensity, persistence, and
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22 ² While the Social Security Administration eliminated the term "credibility" from its sub-regulatory
23 policy addressing symptom evaluation, *see* Social Security Ruling (SSR) 16-3p, case law containing that
term remains relevant.

1 limiting effects of his symptoms not entirely consistent with the evidence. She provided specific,
2 clear, and convincing reasons in support of that conclusion.

3 A. Treatment History

4 In assessing symptom testimony, an ALJ properly considers evidence associated with a
5 claimant's treatment. 20 C.F.R. §§ 404.1529(c)(3), 416.929(c)(3) (treatments or other methods
6 used to alleviate symptoms is "an important indicator of the intensity and persistence of your
7 symptoms"); Social Security Ruling (SSR) 96-7p and SSR 16-3p. This consideration may include
8 the absence of treatment and/or unexplained or inadequately explained failure to seek or follow
9 through with treatment, *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008); *Burch v.*
10 *Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005), as well as improved symptoms and favorable response
11 to treatment, *id.*; *Morgan v. Comm'r of SSA*, 169 F.3d 595, 599-600 (9th Cir. 1999).

12 The ALJ found plaintiff's treatment history not consistent with his allegations. (AR 32.)
13 While alleging disability as of October 1, 2009, there was no evidence he received any treatment
14 for a physical or mental disorder prior to August 2013, more than three-and-a-half years after the
15 alleged onset date. The absence of prescription medication and failure to seek treatment for such
16 a long time indicated tolerable symptoms and undermined the alleged disability. (AR 32-33.)

17 Plaintiff received some therapy and counseling in 2014 and reported less depression with
18 therapy and the medication Zoloft, but had to stop therapy because his insurance would not pay
19 for additional sessions. (AR 33.) While reporting subsequent worsening depression, he did not
20 follow up with his insurance company to get additional counseling, reportedly because he did not
21 like talking to people on the telephone. Yet, he was able to attend an in-person examination to get
22 his State financial assistance continued, indicating an ability to motivate himself when it was to
23 his financial benefit and suggesting his mental health symptoms did not cause similar levels of

1 motivation.

2 As of December 2014, plaintiff was not taking any medication and he did not receive a
3 follow-up for the next six months, allegedly due to his severe depression and not wanting to leave
4 home. He sought care the day after postponement of an ALJ hearing in July 2015, reporting
5 worsened depression since the death of his mother one year earlier, and that his depression prior
6 to her death was not as bad as his current status. (AR 33-34.) At the November 2015 hearing, he
7 reported trying about five different medications, each of which stopped working after a week or
8 two. (AR 34.) However, the record reflected he took Zoloft for at least six months and reported
9 good response. With the large number of anti-depressants available, “one would reasonably expect
10 that a consultation with a psychiatrist might yield additional treatment recommendations.” (*Id.*)
11 No such consultation occurred. Plaintiff did not receive treatment from a psychiatrist or a
12 psychologist, had not required psychiatric hospitalization, and often reported good response with
13 medication management and counseling. He denied medication side effects. At several points, he
14 demonstrated normal mood, affect, judgment, and thought content. The lack of treatment, good
15 response with treatment, and generally normal mood and affect suggested adequate control of
16 symptoms with appropriate treatment.

17 Physically, plaintiff had not sought significant pain management and reported few, if any,
18 back pain exacerbations during the relevant period. (*Id.*) He had minimal and significant gaps in
19 treatment. He underwent a consultation for gastric bypass surgery, but did not qualify due to
20 psychological issues. (AR 36.) He would have been required to participate in group support
21 programs, which he was not comfortable with, and the programs were costly. Even if he could
22 afford this option, he was not likely to pursue it because of his mental state. Plaintiff had not
23 pursued physical therapy referrals. He did not recall such a recommendation, but would engage

1 in physical therapy if it were available. “He then stated his doctor told him he would only be
2 covered for two or three sessions. He explained that this was not really worth his time.” (*Id.*)
3 Plaintiff appeared unwilling to pursue options that may improve his overall functioning and this
4 lack of motivation suggests his physical impairments are not as severe as alleged. “As noted above,
5 the claimant’s depression and financial issues may play some role in this lack of treatment;
6 however, his activities, including walking, caring for his niece, and interacting with people online,
7 all support that the claimant’s ability is greater than he asserts.” (*Id.*)

8 Plaintiff asserts he actually alleged disability as of December 10, 2012. (*See* AR 247.) In
9 fact, the application summaries for DIB and SSI reflect alleged onset dates of December 10, 2012
10 and December 1, 2012 respectively. (AR 247, 251.) However, the alleged onset date is elsewhere
11 consistently documented as October 1, 2009, including in plaintiff’s December 2013 and June
12 2014 disability report forms (AR 287, 298), in the denials of his applications at the initial level
13 (AR 105-06) and on reconsideration (AR 120, 132-33), and as reported by plaintiff’s counsel, in
14 plaintiff’s presence, at the November 2015 hearing (AR 63). (*See also* AR 122, 135, 218, 257-58,
15 272, 283, 293, 296-98, 335-38.) The ALJ properly considered, both in relation to the earlier time
16 period and as a general matter, that plaintiff alleged disability for a number of years in which he
17 received no treatment.

18 Nor did the ALJ err in failing to consider possible reasons plaintiff may not have sought or
19 complied with treatment. SSR 16-3p (“We will not find an individual’s symptoms inconsistent
20 with the evidence in the record on this basis without considering possible reasons he or she may
21 not comply with treatment or seek treatment consistent with the degree of his or her complaints.”)
22 As reflected above, the ALJ did properly consider the testimony and other pertinent evidence of
23 record associated with absent treatment, including financial/insurance reasons and plaintiff’s

1 depression. *Id.* Plaintiff does not identify support for an affirmative obligation on the part of the
2 ALJ to engage in further inquiry. *Id.* (“We *may* need to contact the individual regarding the lack
3 of treatment or, at an administrative proceeding, ask why he or she has not complied with or sought
4 treatment in a manner consistent with his or her complaints.”)

5 Finally, the ALJ did not improperly act as her own medical expert or engage in improper
6 speculation. The ALJ properly considered evidence associated with plaintiff’s treatment,
7 rationally construed the evidence as calling plaintiff’s testimony as to the severity of his
8 impairment into question, and provided numerous persuasive examples in support.

9 B. Medical Evidence

10 “While subjective pain testimony cannot be rejected on the sole ground that it is not fully
11 corroborated by objective medical evidence, the medical evidence is still a relevant factor in
12 determining the severity of the claimant’s pain and its disabling effects.” *Rollins v. Massanari*,
13 261 F.3d 853, 857 (9th Cir. 2001); SSR 16-3p. An ALJ therefore properly considers whether the
14 medical evidence supports or is consistent with a claimant’s allegations. *See id.*; 20 C.F.R. §§
15 404.1529(c)(4), 416.1529(c)(4) (symptoms are determined to diminish capacity for basic work
16 activities only to the extent the alleged functional limitations and restrictions “can reasonably be
17 accepted as consistent with the objective medical evidence and other evidence.”) An ALJ may
18 reject subjective testimony upon finding it contradicted by or inconsistent with the medical record.
19 *Carmickle v. Comm’r of SSA*, 533 F.3d 1155, 1161 (9th Cir. 2008); *Tonapetyan v. Halter*, 242
20 F.3d 1144, 1148 (9th Cir. 2001).

21 The ALJ found the objective medical evidence inconsistent with plaintiff’s allegations.
22 She found an absence of support in the medical evidence for plaintiff’s report of inability to leave
23 his home and crippling anxiety. (AR 33.) For example, when he first sought treatment in August

1 2013, a mental status examination (MSE) was positive for dysphoric mood, but plaintiff was not
2 exhibiting any anxiety or nervousness, was alert and oriented, and had normal mood, affect,
3 behavior, judgment, and thought content. He reported less depression with therapy and medication
4 in 2014 and, in December 2014, increasing social interactions to keep his spirits up, but was not
5 taking any medications. He communicated well during a July 2015 hearing and, in seeking
6 treatment the following day, did not show signs of nervousness or anxiety, was oriented,
7 cooperative, and in no distress, and had normal mood, affect, behavior, judgment, and thought
8 content, and no psychomotor agitation. (AR 33-34.) He maintained good eye contact and initiated
9 conversation. The objective findings were relatively unremarkable and inconsistent with
10 plaintiff's subjective reports.

11 In addition to not seeking significant pain management, plaintiff, for the majority of the
12 period at issue, presented with normal range of motion. (AR 34.) His A1C level was stable
13 throughout 2013 and more recent notes did not show any testing for pre-diabetes. The record
14 showed few, if any, reports of acute exacerbations of back pain and did not reflect exacerbations
15 of the frequency or duration asserted by plaintiff. His back pain was described as intermittent and
16 the record contained a single x-ray, normal and of plaintiff's hip. The minimal objective findings
17 did not support limitations beyond that included in the RFC.

18 Plaintiff contends the ALJ's errors in assessing medical opinions necessarily tainted the
19 evaluation of his symptom testimony. However, as discussed below, the Court finds no such
20 errors. Plaintiff also maintains the ALJ improperly employed the "objective evidence test," but
21 the ALJ did not reject his symptom testimony based *solely* on an absence of objective support.
22 *Rollins*, 261 F.3d at 857. Nor did the ALJ ignore the fact plaintiff was prescribed Zoloft and
23 recommended counseling in October 2013, or improperly reject his 2015 testimony based on

1 inconsistency with MSE findings dated two years earlier. The ALJ properly considered plaintiff's
2 improved symptoms with counseling and medication, including Zoloft, and, among other factors,
3 examples of objective findings inconsistent with the degree of impairment alleged.

4 C. Activities

5 An ALJ appropriately considers inconsistencies or contradictions between a claimant's
6 alleged limitations and his activities, conduct, and other factors. *Bray v. Comm'r of SSA*, 554 F.3d
7 1219, 1227 (9th Cir. 2009); *Thomas*, 278 F.3d at 958-59. Activities may undermine credibility
8 where they (1) contradict the claimant's testimony or (2) "meet the threshold for transferable work
9 skills[.]" *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007).

10 The ALJ found inconsistency between plaintiff's allegations and evidence of his activities
11 and abilities. Plaintiff participated in school full-time after the alleged onset date. (AR 33.) He
12 was in student government, which required him to attend school, interact with students and
13 professors, and manage his school work. This activity was inconsistent with his alleged onset date
14 and alleged disabling social phobia, and suggested good abilities in social and cognitive
15 functioning.

16 The ALJ found inconsistency between plaintiff's activities throughout the record and a
17 finding of total disability and inability to work. (AR 34.) Even after he left school, his activities
18 did not support disabling depression and anxiety. He watched his young niece overnight regularly
19 during the period at issue and, while his niece slept the majority of that time, he would have been
20 required to provide care if she woke up. (AR 34-35.) He also babysat his niece, including at least
21 a one-month period when he watched her four-to-seven days a week. (AR 35 (citing AR 487, 491
22 (September-October 2014).) (*See also* AR 366 (May 21, 2013: gets niece off bus and waits for
23 sister to come home); AR 448 (February 7, 2014: no responsibility until 3:00 when niece gets off

1 bus).) The ability to undertake the physically and mentally demanding work of caring for a child
2 during the day and the figurative “on-call” responsibilities at night argued against the alleged
3 inability to sustain remunerative work activity.

4 Plaintiff had regular social interactions despite his allegation of self-isolation. (AR 35.) In
5 December 2014, he reported increasing his social interactions with others. (AR 33.) He lives
6 with his brother, previously lived with his sister, and prior to that lived with his mother. He
7 reported interacting with people online and playing video games, including with a friend once or
8 twice a week. (AR 35-36.) During evaluations, he interacted appropriately and communicated his
9 views and feelings without difficulty. These activities indicated his ability to handle some
10 potentially challenging social interactions and suggested functioning at a much greater level than
11 alleged. He also reported attempts to walk, but inability to perform sit-ups or push-ups, suggesting
12 an ability to perform work allowing him to sit for the majority of the day. (AR 36.)

13 Plaintiff points to additional information associated with his activities, such as the fact he
14 was fired from his work study job due to his grades and had to drop out of college because he was
15 failing. (*See* AR 34, 70-71, 283.) He describes the ALJ’s consideration of his childcare
16 responsibilities, social interactions, and other activities as baseless and speculative.

17 The ALJ is tasked with assessing a claimant’s symptom testimony and resolving conflicts
18 in the testimony and ambiguities in the record. *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d
19 1090, 1098 (9th Cir. 2014). When evidence reasonably supports the ALJ’s conclusion, and when
20 the ALJ’s interpretation of the evidence is rational, the decision is properly upheld. *Tackett v.*
21 *Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999), and *Morgan*, 169 F.3d at 599. The Court finds no
22 error in the ALJ’s consideration of the above-described activities.

23 The ALJ did misconstrue a record to reflect that plaintiff looked for work. (*See* AR 33

1 (citing AR 425 (March 2014: “depression high – right now not able to sleep – not looking for a
2 job wants to feel better so that he can feel better in order to do things).) However, given the other
3 activities and other valid reasons for the ALJ’s decision, this error is properly deemed harmless.
4 *Carmickle*, 533 F.3d at 1162-63. *See also Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
5 (ALJ’s error may be deemed harmless where it is ““inconsequential to the ultimate nondisability
6 determination.””; the court looks to “the record as a whole to determine whether the error alters
7 the outcome of the case.”).

8 D. Other Factors

9 The ALJ found inconsistent statements regarding plaintiff’s family history, noting his
10 disclosure of a history of abuse to his counselors and to examining psychologist Dr. Keith Krueger,
11 but not to examining psychologist Dr. Kimberly Wheeler, who evaluated him on three separate
12 occasions. (AR 35.) This inconsistency made plaintiff’s history and extent of his mental health
13 issues unclear. The ALJ also noted a December 2013 report that his mother had recently died, he
14 needed to obtain a job to help with financial obligations, and that this caused increased anxiety
15 because he only qualified for physical labor jobs he could not perform. (*Id.*) The ALJ found this
16 suggested plaintiff did not consider himself unable to perform jobs that did not require physical
17 labor and appeared to contradict his alleged disability.

18 Plaintiff did tell Dr. Wheeler he was spanked with a belt, although it was not “too extreme.”
19 (AR 366.) He argues his willingness to disclose more detail over time is not a convincing reason
20 to reject his testimony. He states his expression regarding a need to obtain a job proves nothing
21 about whether he could have sustained any type of full-time work activity, and avers he is primarily
22 disabled by mental, not physical limitations.

23 In assessing symptom testimony, an ALJ properly engages in “ordinary techniques”

1 associated with such evaluation, such as consideration of prior inconsistent statements and
2 statements that appear less than candid. *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996). In
3 this case, neither of the examples of other inconsistencies in plaintiff's statements and reporting
4 are particularly compelling. At the same time, the examples do not undermine the substantial
5 evidence support for the ALJ's decision. For example, plaintiff did provide markedly different
6 information to Drs. Wheeler and Krueger. (*Compare* AR 366 ("Recalls being spanked with a belt,
7 'but nothing too extreme.'"), *with* AR 451 ("[Father] is 'cold, disgusting, mean' person. . . .
8 [C]ould be abusive at times. Hit with belt, coat hanger 'until his arms got tired'. Once punched .
9 . . in face after broke a toy vehicle. Some other examples as well.))) Even upon seeing Dr. Wheeler
10 for the third time, after his evaluation with Dr. Krueger, plaintiff did not disclose abuse. (*See* AR
11 511-12.) Nor did the ALJ improperly consider the fact that, in discussing a need to look for work,
12 plaintiff focused on his physical limitations. (AR 383 (October 2013 follow-up appointment for
13 depression and anxiety: "Patient informs me that he has to get a job now to help with the financial
14 obligation and this has been causing him increased anxiety as he is only qualified for physical
15 labor jobs, but does not feel he could actually do physical labor because of his size.))) In sum, the
16 ALJ's assessment of plaintiff's symptom testimony has the support of substantial evidence and
17 will not be disturbed.

18 Medical Evidence

19 Plaintiff argues the ALJ improperly rejected the opinions of examining psychologists Dr.
20 Wheeler and Dr. Krueger, and the opinion of treating nurse practitioner Ciara Smith. As examining
21 doctors, the opinions of Drs. Wheeler and Krueger are entitled to greater weight than the opinions
22 of non-examining doctors. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Because the record
23 contained contradictory opinions from non-examining State agency psychological consultants Dr.

1 John Gilbert and Dr. Sean Mee (AR 112-14, 127-28), the ALJ could reject the opinions of Drs.
2 Wheeler and Krueger with specific and legitimate reasons supported by substantial evidence in the
3 record. *Lester*, 81 F.3d. at 830-31. The opinion of nurse practitioner Smith was entitled to less
4 weight than the opinion of a doctor, *Gomez v. Chater*, 74 F.3d 967, 970 (9th Cir. 1996), and could
5 be discounted with germane reasons, *Molina*, 674 F.3d at 1111.³

6 A. Dr. Kimberly Wheeler

7 Dr. Wheeler evaluated plaintiff on three occasions. (AR 366-70, 468-72, 511-15.) On
8 May 21, 2013, Dr. Wheeler assessed a Global Assessment of Functioning (GAF) score of 56 (AR
9 368), reflecting moderate symptoms or moderate difficulty in social, occupational, or school
10 functioning. Diagnostic and Statistical Manual of Mental Disorders 34 (4th ed. 2000) (DSM-IV-
11 TR).⁴ In addition to various mild and moderate limitations, Dr. Wheeler found marked limitations
12 in the ability to adapt to changes in a routine work setting, communicate and perform effectively
13 in a work setting, and set realistic goals and plan independently. She identified eight-to-ten months
14 duration of impairment with available treatment. (AR 369.) On November 4, 2014, Dr. Wheeler
15 assessed a GAF of 54 and marked limitations in the ability to perform activities within a schedule,
16 maintain regular attendance, and be punctual, adapt to changes in a routine work setting, and
17 complete a normal work day and week. (AR 470.) She identified nine plus months duration of
18

19 ³ Regulations applicable to plaintiff's claim considered Smith as an "other source." 20 C.F.R. §§
20 404.1502, 404.1513, 416.902, 416.913, and SSR 06-03p (rescinded effective March 27, 2017). New
21 regulations include nurse practitioners and others as "acceptable medical sources," like physicians and
psychologists. 20 C.F.R. §§ 404.1502, 416.902.

22 ⁴ The most recent version of the DSM does not include a GAF rating. DSM-V at 16-17 (5th ed.
23 2013). A GAF score cannot alone be used to "raise" or "lower" someone's level of function, and, unless
the reasons behind the rating and the applicable time period are clearly explained, it does not provide a
reliable longitudinal picture of mental functioning for a disability analysis. Administrative Message 13066
("AM-13066").

1 impairment with available treatment. (AR 471.) Finally, on October 21, 2015, Dr. Wheeler
2 assessed marked limitations in the ability to perform activities within a schedule, maintain regular
3 attendance, and be punctual, adapt to changes in a routine work setting, ask simple questions or
4 request assistance, and complete a normal work day and week, and an overall severity rating of
5 marked. (AR 513.) She identified twelve plus months of impairment with available treatment.
6 (AR 514.)

7 The ALJ found the May 2013 opinion an overstatement of plaintiff's mental health
8 impairment, and not consistent with his functioning throughout the record or with his presentation
9 to treating providers. (AR 37.) The evaluation was based on a single visit in which plaintiff was
10 attempting to obtain State cash and medical benefits. It did not provide a longitudinal view of
11 functioning. When plaintiff actually sought treatment in August 2013, the MSE was unremarkable
12 and inconsistent with Dr. Wheeler's assessment. While positive for dysphoric mood, it was
13 negative for suicidal thoughts, sleep disturbance, or self-injury. (AR 393.) Plaintiff did not exhibit
14 anxiety or nervousness, was alert and oriented, and had normal mood, affect, behavior, judgment,
15 and thought content. The observations were not consistent with the limitations assessed by Dr.
16 Wheeler. The ALJ found the assessed moderate and marked limitations to have limited support
17 and gave them minimal weight. (AR 37.)

18 Dr. Wheeler's November 2014 opinion was based on another one-time evaluation and
19 likewise reflected only a snapshot of functioning, rather than a longitudinal view. (AR 39.) More
20 importantly, the assessed moderate and marked limitations significantly overstated plaintiff's
21 functional limitations. The ALJ found inconsistency with plaintiff's activities during the period at
22 issue. "For example, it is not consistent with reports of playing online video games with friends
23 for hours at a time, interacting with family, and babysitting his niece." (*Id.*) She found

1 inconsistency with a medical appointment one month later in which plaintiff reported his
2 depression was better and fairly well-controlled with increased social interactions. (AR 495-98.)
3 The ALJ gave the opinion minimal weight. (AR 39.)

4 The ALJ, finally, gave minimal weight to Dr. Wheeler's October 2015 opinion. (AR 39-
5 40.) She found the opinion of marked limitations in the ability to ask even simple questions not
6 supported by plaintiff's presentation at hearing or during numerous other medical appointments,
7 and inconsistent with his ability to regularly seek Washington State Department of Social & Health
8 Services (DSHS) cash and medical benefits. The ALJ identified inconsistency with findings in an
9 October 12, 2015 medical appointment where plaintiff was not nervous or anxious, was oriented,
10 cooperative, and in no distress, exhibited good eye contact and initiated conversation. (AR 508-
11 09.) During the most recent hearing, plaintiff responded clearly and thoroughly to both simple and
12 complex questions, was articulate, focused, and required little if any redirection. (AR 40.) This
13 was similar to his presentation at the majority of non-DSHS evaluations. The ALJ found it not
14 clear what Dr. Wheeler based this limitation on and its inclusion called into question the reliability
15 of the other limitations assessed. Overall, Dr. Wheeler's opinion overstated the degree of
16 plaintiff's limitations.

17 Plaintiff rejects the ALJ's description of these single or one-time evaluations, noting the
18 consistency of all three opinions. He asserts the consistency of Dr. Wheeler's opinions with her
19 own independent findings on examination, and maintains the ALJ substantially mischaracterized
20 his very limited activities. Plaintiff rejects the alleged inconsistency with treatment notes. For
21 example, the August 2013 note reflected his report of "generalized feeling of sadness, [complaint
22 of] anhedonia, lack of energy[,]" and observation of dysphoric mood. (AR 392-93.) The
23 December 2014 note included plaintiff's report he lacked energy and motivation, had a difficult

1 time falling asleep, and is always sleepy and naps during the day. (AR 495.) Plaintiff differentiates
2 between an ability to function in medical appointments and to appear articulate and responsive in
3 a hearing, with the ability to function in a competitive work environment.

4 The ALJ properly assigned the opinions of Dr. Wheeler minimal weight based on
5 inconsistency with the medical record. 20 C.F.R. §§ 404.1527(c)(4), 416.927(c)(4) (“Generally,
6 the more consistent a medical opinion is with the record as a whole, the more weight [the ALJ]
7 will give to that medical opinion.”); *Tommasetti*, 533 F.3d at 1041 (ALJ may reject opinion based
8 on inconsistency with the medical record). She persuasively identified inconsistencies in MSEs
9 and treatment notes contemporaneous to each of the evaluations. She also properly considered
10 inconsistency with plaintiff’s activities. *Rollins*, 261 F.3d at 856 (affirming rejection of a treating
11 physician’s opinion that was inconsistent with the claimant’s level of activity). The ALJ further
12 properly considered inconsistency between a particular opinion and other evidence in the record,
13 including plaintiff’s presentation at hearing and during numerous medical appointments and
14 evaluations. *See* 20 C.F.R. §§ 404.1527(c)(6), 416.927(c)(6) (ALJ properly considers any factor
15 that tends to support or contradict the opinion of a physician). She reasonably found such
16 inconsistency to call into question other assessed limitations.

17 The ALJ, in sum, provided the required specific and legitimate reasons for rejecting Dr.
18 Wheeler’s opinions. As argued by the Commissioner, plaintiff in large part interprets the evidence
19 differently. Because the ALJ provided an at least equally rational interpretation of the evidence,
20 plaintiff does not demonstrate error.

21 B. Dr. Keith Krueger

22 Dr. Krueger evaluated plaintiff on January 30, 2014. (AR 451-61.) He assessed a GAF of
23 60 (AR 453), reflecting moderate symptoms or difficulty, DSM-IV-TR at 34. He found plaintiff

1 in most part moderately impaired, but marked limitations in the ability to communicate and
2 perform effectively in a work setting, complete a normal work day and week, and set realistic goals
3 and plan independently. (AR 453.) He identified six months duration of impairment with available
4 treatment. (AR 454.)

5 The ALJ found the opinion of difficulty communicating not consistent with plaintiff's
6 ability to respond adequately during evaluations and at hearing. (AR 38.) He found the opinion
7 inconsistent with the unremarkable MSEs, including those in August 2013 and July 2015. (*See* AR
8 393, 499-501.) The observations during treatment were not consistent with the limitations assessed
9 in examinations to obtain State cash assistance and medical benefits. Just a few months prior to
10 Dr. Krueger's evaluation, plaintiff reported his physical impairments as the primary barrier to
11 employment. (AR 383.) The ALJ gave Dr. Krueger's opinion minimal weight.

12 Plaintiff reiterates arguments raised in relation to Dr. Wheeler.⁵ He criticizes the ALJ's
13 description of his reporting as misleading given that he also then reported he "has many days where
14 he locks himself in his room and doesn't want to interact with anyone." (AR 383.) The Court,
15 however, finds specific and legitimate reasons for rejecting the opinion of Dr. Krueger. The ALJ
16 properly assigned the opinion of Dr. Krueger minimal weight based on inconsistency with the
17 medical evidence of record, §§ 404.1527(c)(4), 416.927(c)(4); *Tommasetti*, 533 F.3d at 1041, and
18 with his presentation and performance on numerous other occasions, §§ 404.1527(c)(6),
19

20 ⁵ Plaintiff asserts, for example, that Dr. Krueger's clinical findings support his opinions. However,
21 plaintiff does not provide any supportive argument or acknowledge that the ALJ did not find Dr. Krueger's
22 opinion inconsistent with his own findings. Nor does plaintiff acknowledge content of Dr. Krueger's report
23 not helpful to his argument. (AR 454 ("Job would be good for his [depression]; give him some structure
and focus, give him purpose, help him feel less helpless and more productive, get him moving (rather than
sitting and playing video games for [hour] after [hour]. Said would like to become a programmer;
vocational counseling should be able to help in this regard. [Mental health] counseling should also help,
[especially] if focused on his social anxiety, teaching him more realistic ways to confront his fears of others
hurting him in some way."))

1 416.927(c)(6). The ALJ also reasonably considered plaintiff's reporting only a few months prior
2 to this appointment. The fact plaintiff complained of mental health issues at that appointment does
3 not negate the significance of his other reporting. Indeed, the purpose of the appointment was a
4 follow-up for depression and anxiety. (AR 383.) The ALJ reasonably considered that plaintiff
5 nonetheless discussed his obesity, not mental impairment, as the barrier to his employment.

6 C. ARNP Ciara Smith

7 Nurse practitioner Smith completed a physical functional evaluation in December 2014.
8 (AR 465-67.) She assessed marked to severe limitations resulting from plaintiff's morbid obesity
9 and from bilateral foot and knee pain secondary to morbid obesity, moderate to severe limitations
10 associated with his low back pain, and moderate impairment in communication due to depression,
11 and found him limited to sedentary work. (AR 466-67.) Smith recommended physical therapy,
12 counseling, weight loss, and a dietician consultation. (AR 467.) In the associated chart note,
13 Smith found plaintiff unable to stand for greater than ten-to-fifteen minutes before needing to rest,
14 and able to sit for greater than twenty minutes, but often needing to lay down or stand up to
15 alleviate pressure on his low back. (AR 495.) He could communicate well.

16 The ALJ found Smith's opinion an overstatement of physical functioning. (AR 39.) She
17 found it inconsistent with plaintiff's activities, which had included walking regularly, babysitting
18 his niece, and sitting for long periods of time in class and while playing video games. It was also
19 inconsistent with objective findings, which generally showed normal range of motion and
20 objectively normal x-rays. The ALJ assigned the opinion minimal weight.

21 The ALJ provided sufficient germane reasons for assigning minimal weight to Smith's
22 opinion. *See* 20 C.F.R. §§ 404.1527(c)(4), 416.927(c)(4); *Tommasetti*, 533 F.3d at 1041; and
23 *Rollins*, 261 F.3d at 856. Plaintiff asserts a contrary interpretation of the medical record by

1 pointing to his obesity and other evidence in the record as objective support for Smith's opinion.
2 He denies inconsistency with his activities. However, the ALJ offered a different, but at least
3 equally rational interpretation of the record. The Court finds no error.

4 Lay Evidence

5 Lay witness testimony as to a claimant's symptoms or how an impairment affects ability
6 to work is competent evidence and cannot be disregarded without comment. *Van Nguyen v.*
7 *Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). The ALJ can reject lay witness testimony only upon
8 giving germane reasons. *Smolen*, 80 F.3d at 1288-89. However, the failure to address lay
9 testimony may be deemed harmless where it is "inconsequential to the ultimate nondisability
10 determination." *Molina*, 674 F.3d at 1115. The Court must look to the record as a whole "to
11 determine whether the error alters the outcome of the case." *Id.* at 1115, 1117-22 (failure to address
12 lay testimony harmless where witness did not describe limitations not already described by
13 claimant, and reasons for rejecting claimant testimony applied equally well to lay witness).

14 The ALJ considered lay testimony from plaintiff's sister. His sister stated, for example,
15 plaintiff had a hard time standing and walking for more than twenty-to-thirty minutes at a time
16 without having to sit, cannot sit for more than an hour or two without having to lie down, could
17 not sit in a waiting room without having an anxiety attack, and sometimes does not leave the house
18 for weeks at a time. (AR 353-57.) The ALJ found the testimony somewhat credible as to
19 observations, but not consistent with the objective medical evidence. (AR 36.) Symptoms of the
20 severity reported by plaintiff's sister had never been described or observed in plaintiff's various
21 psychological or physical examinations. The statements appeared inconsistent with the reported
22 level of activity throughout the record, which included going to school full time, participating in
23 student government, and regular babysitting. The ALJ gave the lay statement minimal weight.

1 Germane reasons for discounting lay testimony include inconsistency with medical
2 evidence, evidence of a claimant's activities, and a claimant's reports. *Lewis v. Apfel*, 236 F.3d
3 503, 511-12 (9th Cir. 2001). Contrary to plaintiff's contention, the ALJ provided reasons germane
4 to his sister and supported by substantial evidence.

5 Plaintiff also avers error in the ALJ's failure to evaluate observations of Social Security
6 Administration (SSA) Interviewer B. Holden on June 12, 2014. Holden observed the following
7 when assisting plaintiff with his disability report form: "Claimant was very antsy and was moving
8 all the time, he talked [incessantly] and appeared very [agitated]. He was with his brother and
9 sister during the interview." (AR 299.) Plaintiff argues the failure to address these observations
10 violated SSR 16-3p and 20 C.F.R. §§ 404.1529(c)(3), 416.929(c)(3), both of which indicate the
11 SSA will consider symptom observations of agency employees.

12 The Commissioner asserts that, while it must be taken into account, the ALJ need only
13 discuss lay evidence to the extent it is rejected. *See Lewis*, 236 F.3d at 511 ("Lay testimony as to
14 a claimant's symptoms is competent evidence that an ALJ must take into account, unless he or she
15 expressly determines to disregard such testimony and gives reasons germane to each witness for
16 doing so."); *Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984) (ALJ "need not discuss
17 all evidence presented" and, rather "must explain why 'significant probative evidence has been
18 rejected.'") (quoted source omitted); *Turner v. Comm'r of Soc. Sec.*, 613 F.3d 1217, 1223 (9th Cir.
19 2010) (ALJ need not provide reason for rejecting physician's report where ALJ did not reject any
20 of physician's conclusions and incorporated the observations into the RFC). The Commissioner
21 argues that, consistent with Holden's observations, the ALJ found multiple severe mental health
22 impairments and assessed significant mental limitations. Specifically, the ALJ limited plaintiff to
23 simple and detailed tasks, while recognizing possible difficulty with completion of more complex

1 tasks due to anxiety, precluded work with the public beyond superficial interactions, and found him
2 able to work in proximity to and interact with coworkers, but performing best in more solitary
3 work tasks. (AR 31.) She avers plaintiff's failure to show inconsistency between Holden's
4 observations and the ALJ's decision. Plaintiff replies that the ALJ, not the Commissioner, is
5 required to evaluate the evidence. He asserts that, nonetheless, the observations at issue do show
6 limitations precluding all competitive work.

7 The Court finds any error in the failure to specifically address and reject Holden's
8 statements harmless. Plaintiff does not explain how Holden's observations reflect limitations
9 precluding the ability to work. Nor does he identify a conflict with the RFC. The RFC did not
10 require plaintiff to remain stationary and included limitations to minimize his interactions with
11 others and the potential for agitation/anxiety. The ALJ properly relied on the medical evidence of
12 record in reaching her conclusion as to plaintiff's abilities and limitations. The Court finds nothing
13 to support the contention Holden's observations would have changed the outcome of the decision.
14 *See, e.g., Baker v. Berryhill*, No. 15-35284, 2017 U.S. App. LEXIS 26258 at *8 (9th Cir. Dec. 21,
15 2017) ("The ALJ also did not commit harmful error in neglecting to discuss lay witness evidence
16 from a Social Security employee who interviewed Baker and reported Baker had difficulty with
17 mobility and needed to stand periodically due to pain in her back and hips. The ALJ credited more
18 reliable medical evidence that contradicted this lay witness opinion, and Baker has not shown how
19 omitting discussion of the lay witness testimony would have changed the ALJ's decision. Thus,
20 any error was harmless.") (citing *Molina*, 674 F.3d at 1119).

21 Step Three

22 Plaintiff contends the opinions of Dr. Wheeler, Dr. Krueger, and Smith, considered with
23 her testimony and the lay testimony, show satisfaction of Listings 12.04 (depression) and/or 12.06

1 (anxiety), given the at least marked limitations in social functioning and in concentration,
2 persistence, or pace. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 1, §§ 12.04, 12.06. He “also arguably
3 meets or equals the C criteria of these listings.” (Dkt. 12 at 17.)

4 Plaintiff bears the burden of proof at step three. *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5
5 (1987). To meet a listing, an impairment “must meet *all* of the specified medical criteria.” *Sullivan*
6 *v. Zebley*, 493 U.S. 521, 530 (1990) (emphasis in original). To establish equivalency, there must
7 be “medical findings equal in severity to *all* the criteria” for the listing. *Id.* at 531. The ALJ did
8 not err in considering the opinion evidence or testimony. Plaintiff does not meet his step three
9 burden with his cursory and conclusory assertion of error.

10 RFC and Step Five

11 Plaintiff also avers error in the RFC and at step five based on the alleged errors in relation
12 to opinion evidence and testimony. This mere restating of arguments does not establish error at
13 step four or step five. *See Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1175-76 (9th Cir. 2008).

14 CONCLUSION

15 For the reasons set forth above, this matter is AFFIRMED.

16 DATED this 13th day of November, 2018.

17 
18 Mary Alice Theiler
19 United States Magistrate Judge
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